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Hunger as a policy instrument?

Some reflections on workfare and forced labour

Prof. dr. G.J. Vonk¹

In our social security systems the harsh work test has been replaced by a more moderate system which tries to strike a balance between the right to benefit and the obligation to work. This balance is, however, shifting is a result of the workfare approach. This approach, generally advocated to activate social security claimants, is not devoid of dangers. Social security administrations may exercise indiscriminate powers over individuals. And, if pursued too ruthlessly, activation policies which are designed to be beneficial for the citizens may have the opposite effect, condemning ‘those who stay behind’ to a permanent underclass. It is up to the courts to restore the balance between the rights and obligations. As long as the rule of law is upheld the dangers of the workfare approach can be kept at bay. This requires an active attitude of the courts and a strict focus upon the protection of human rights. When dealing with the prohibition of forced labour both the European Court of Human Rights and some national courts tend to apply these rights too restrictively. In this article it is argued that it is no longer acceptable to reject outright the relevance of the prohibition of forced labour in social security cases. Instead, minimum standards for testing the legality of workfare practices should be developed. These should refer to the nature and duration of public employment duties, as well as to the severity of the sanctions. The recent decision of the Dutch district court of Arnhem of 8 October 2008 constitutes a perfect illustration of such an alternative approach.

1. Introduction

The title for this treatise which I was invited to reflect upon, is a provocative one. The notion of “hunger as a policy instrument” implies that states consciously use the deprivation of people to realize certain public goals. Perhaps such policies are conceivable in periods of (temporary)² loss of civilization but otherwise? Modern civilized states adhere to the rule of law. They have accepted socio-economic fundamental rights, such as the right to a decent standard of living and the right to social security. These rights presuppose that nobody deserves to be poor and that states are under a duty to create a welfare system, in whatever form, which is aimed at alleviating the needs of the masses, without threatening the livelihood of others. Should we really question the sincerity of the efforts of states in this field? God have mercy on the cynics!

But suppose we would approach the phenomenon of hunger not so much from the point of view of official policies, but rather from the function it has in crafting relations in our

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² Conceivable? I never forget my disbelief when I read for the first time that somewhere in the machinery of Nazi Germany a plan had been deployed to literally starve the slave people in order to create *Lebensraum* for themselves.

society, as some sociologists want us to do? Then it is true that it can be an easy instrument in the hands of some to force others (the poor) into certain behaviour. Even though official policy would not readily formulate it in these terms, the fact remains that the threat of taking away the livelihood of social security beneficiaries, can be used as a disciplinary tool. Indeed, in literature this disciplinary function of social welfare law, in particular the application of the so called 'work test' in some social security schemes (in particular unemployment benefits and social assistance) is widely accepted.³

In this contribution I touch upon the instrumental perspective of poverty in our social welfare systems (withholding benefit rights to enforce certain behaviour). Firstly, I will describe how the previously existing harsh and unforgiving attitude towards poverty has given way to a right based approach. This is reflected in the state of the law which attempts to strike a careful balance between the right to benefit and the work obligations of the beneficiary. Such balance can for example be illustrated with reference to the concept of 'suitable employment' used in various social security acts. (paragraph 2) Secondly, I will demonstrate how the balance between rights and duties runs the risk of being disturbed as a result of the modern *workfare* approach, adopted by an increasing number of states. This approach combines a strict work test and sanctions with far ranging discretionary powers for the administration. If handled in the wrong way, this may result in repressive practices which ignore the right to social security for the individual claimant (paragraph 3). Thirdly and finally, I will argue that governments, and in particular courts are under a duty to maintain the balance between rights and obligations, by giving effective application to the fundamental right to the right to work and the prohibition of forced labour (paragraph 4).

In literature workfare policies are very often discussed within the context of the welfare state at large. The concept of the welfare state is wider than the concept of social security. In the first place 'welfare' refers not only to the provision of income security in case of poverty or certain risks, such as unemployment and old age, but to the whole spectrum of government action intended to make sure that citizens meet their basic needs, such as education, housing and health. In the second place 'welfare' does not only refer to cash benefits schemes, but also to various types of services and in-kind programmes often considered to fall outside the social security domain, such as probation and parole, child protection services, socialization services, etc.⁴ As I am mostly focussing on the work test as a condition for receiving unemployment and social assistance cash benefits, this article is confined to the subject of social security only.

Although the questions and issues raised will be dealt with in a general manner, the situation in the Netherlands is taken as a fixed point of reference.

2. Social security and work as fundamental rights

In the pre-modern period there was no need for the society to worry too much about activating the poor into work. Hunger drove the masses into activity. Only with the

³ Cranston, R. *Legal foundations of the welfare state*, Weidenfeld and Nicholson, London, 1995, 202-207

⁴ For the meaning of the term social welfare, see Popple & Leighninger (1993).

emergence of the first public relief schemes did work incentives have to be organized. Thus, the nineteenth century poor laws made a clear cut distinction between the deserving poor and the undeserving. Those who were not incapacitated as a result of sickness, handicap or old age (the so called able bodied) were forced to participate in publicly organized employment. Work houses were set up in which men, women and children had to carry out manual activities in miserable conditions for long hours a day. There was no easy escape from the work house. Dealing with poverty was considered to be part of the policing function of the state. Vagrancy was a criminal offence. Sometimes vagabonds were literally rounded up and kept in confinement in forced labour camps.⁵ Especially during the 19th century, a period during which the state had largely withdrawn from society and many traditional forms of care had eroded under the influence of the industrial revolution, poverty and poor law dependency were a terrible ordeal for the people involved.⁶

During the course of the 20th century the conditions improved. Work houses were abolished and the notion of public charity gradually eroded in favour of legal guarantees for the beneficiary. After the Second World War these developments culminated in the recognition to social security and work as human rights. Nowadays we believe that nobody deserves to be poor, that everybody should be able to earn his living in an occupation freely entered upon (the right to work) and that there should be a system for the protection of major risks ensuing from labour and life and poverty in general (the right to social security).

The *right to work* is adopted in the national constitutions of many countries, as well as in various international instruments on socio-economic fundamental rights, such as the European Social Charter (ESC⁷) and the International Covenant on social, economic and cultural rights (ICESCR⁸). It is not easy to catch the meaning of this right in a single phrase. On the one hand it presupposes a positive obligation of the state to strive for a high and stable level of employment and to provide and promote employment services and occupational training. On the other hand it displays characteristics of a freedom right where it protects the freedom of occupation. In the latter sense the right to work is related to the prohibition of slavery and forced labour, adopted in the other human rights instruments, such as the International Covenant on economic, social and cultural rights (art. 6) the European Convention on human rights (art. 4) and conventions of the ILO⁹.

The *right to social security* is not one-dimensional either. It is generally understood that it presupposes a final responsibility for the state to set or orchestrate a system of income protection for a number of social risks, such as unemployment, sickness, invalidity, old

⁵ The Dutch example of these practices was poor colony of Veenhuizen in the province of Drenthe, which started the first half of the 19th century as a charitable initiative, but quickly evolved into forced labour camp in which vagrants were locked up.

⁶ For an historical account cf. Samuel Fleischacker, *A short history of distributive justice*, Harvard University Press, Cambridge (Mass.) 2004.

⁷ Art. 1 ESC

⁸ Art. 6 ICESCR

⁹ E.g. Forced Labour Convention, 1930 (ILO, nr.29)

age, etc. and a basic floor for persons who are left without any other resources.¹⁰ Also the rule of law is considered fundamental for the right to social security as a human right. The previously existing system of charity and poor laws did not presuppose a legal obligation to provide benefit. This was a matter of discretion for the institutions which are -at most- under a moral obligation to deliver. Consequently, in a charitable system there cannot be any corresponding right to a benefit either for the recipient. The right to social security however presupposes a system under which persons are entitled to support. This suggests that the beneficiary has some sort of legally defined position.¹¹ The inference of a legally defined position is that claims should be vested in the law and can be enforced.

When we combine the right to work and the right to social security, it follows that it is no longer acceptable to require a person to offer his physical capacities to some form of organized employment in direct return for public support. Indeed, when we look at our present day social security systems it appears that the relation between benefit entitlement and duty to work is no longer construed in this way. A person qualifies for benefit when he or she satisfies certain objective conditions and then has to accept certain obligations. These obligations may very well involve a duty to work and accept offers of employment, but as a starting point, the beneficiary is allowed to choose the employment himself on the free labour market, thereby taking into account the job offers that are made to him by the labour exchange or social security authorities. Moreover the concept of employment is a qualified one. It refers to *suitable employment*. It has been argued that the right to work should be interpreted as a right to obtain suitable employment and that work undertaken under pressure of need (the withdrawal of benefit) is not suitable within the meaning of the relevant standards of the ILO.¹² In my eyes this might be too optimistic, but at least the term suitable employment presupposes that the work must somehow be fitted to a person's capacities, experience, education, etc. Whether or not this is the case should be established on the basis of individual merits. Finally, the sanctions which may be imposed if a person refuses to accept suitable employment are to be regulated by the law. They should be proportionate and the claimant should have access to an independent judge if he or she wishes to dispute the decision of the administration.

¹⁰ Cf.. Eibe Riedel 'The human right to social security, some challenges' in: *Social Security as a Human Right, Drafting a General Comment on Article 9 ICESCR*, Eibe Riedel (ed.), Berlin 2007, 16-28. On the nature of the state obligations in the field of social security. cf. Gijsbert J. Vonk @ Albertjan Tollenaar, 'The public interest and the welfare state, a legal approach, Working paper annual legal research network conference, Groningen, 2008: <http://www.rug.nl/crbs/onderzoek/networkconference2008/papers2008>

¹¹ This fundamental distinction between charity and social security has been reflected upon in an impressive opinion of Advocate General *Mayras* of the European Court of Justice in the *Frilli*-case, where the court had to decide on the exclusion of 'social assistance' from the material scope of social security regulation no. 3/58 (now Regulation 1408/71) and is -as a bottom line- still accepted in the Court's case law up to this day. ECJ 22 June 1972 (*Frilli*), 1972 *ECR* 457.

¹² Cf. Frans Joseph Smit 'Suitable employment as a human right', in: *Reflections on International Law from the Low Countries*, Erik Denters and Nico Schrijvers (eds.), Kluwer Law International, 1998, 191-197 (as a summary of the authors valuable doctoral thesis, *Passende arbeid als recht van de mens, recht op arbeid en op werkloosheidsuitkering in internationaal en Nederlands recht*, Kluwer 1994)..

If we accept this description as an abstract model for applying the work test in modern social security systems, it follows that a harsh work test is replaced by a more moderate system which tries to strike a balance between the right to benefit and obligation to work

3. Workfare and the effect on the balance between rights and duties

The balance between rights and duties in our social welfare system is, however, shifting. More emphasis is placed on the participatory function of social security and the enforcement of rules while social security's function in protecting income is pushed to the background. These changes, which have particularly affected the area of social assistance, are often referred to as the "workfare" approach.¹³ In a more narrow sense of the word the term workfare is reserved for the situation in which claimants of social assistance are required to perform work, often in public-service jobs, as a condition of receiving aid. The latter, narrow definition immediately brings us to the heart of the matter: does workfare reintroduce the 19th century practice of requiring "a person to offer his physical capacities to some form of organized employment in direct return for public support", as I phrased it above?

The answer to this question is not necessarily affirmative. As will be pointed out below, much depends on the legal guarantees surrounding the workfare programmes. But before we embark on this subject, let us first of all have look at how the workfare approach might upset the balance between rights and obligations that has gradually developed in our social security systems.

Indiscriminate powers over the individual

One of the characteristics of the legislative changes which are introduced under influence of the workfare approach is the erosion of the legally defined position for the beneficiary in favour of more discretion for the local authorities responsible for benefit payments. Thus, for example with respect to the new Dutch *Work and Assistance Act* (2003) municipalities have been given wide ranging powers in the area of the activation of beneficiaries and the imposition of sanctions. The powers are partly regulated in the form of local council regulations and policy guidelines, but sometimes powers are directly placed in the hands of individual administrators. The purpose of the *Work and Assistance Act* is to provide tailor made solutions. The obligations or sanctions to be imposed upon the individual claimant are to be established on a case by case basis; each claimant should get the treatment that he or she deserves. In this way social assistance has once again become a matter of unilateral, discretionary judgment of the authorities involved. In the meanwhile work first projects have sprung up all over the place. In these projects young people, new claimants and sometime also those who have been on benefit for a long period are obliged to carry out services for the community, in the parks, in work factories or as street cleaners. Those who do not join in will be confronted with benefits cuts.

¹³ For an overview cf. Joel F. Handler, *Social Citizenship and Workfare in the United States and Western Europe, The Paradox of Inclusion*, Cambridge studies in law and society, Cambridge, 2004.

The danger of wide ranging discretionary powers is simply that these powers may be applied too rigorously. Local councils, or indeed individual administrators, may hold extreme views on the duties of the claimants of benefit and impose unfair demands and disproportionate sanctions. If the powers of the councils or administrators are not properly counterbalanced by the legal rights of the beneficiaries, this might give rise to forms of abuse. For example, what should be made of the suggestion put forward in 2005 by the former Dutch Minister of Social Affairs, De Geus, that prostitution should be accepted as suitable employment? Or the Enschede local authority that threatened to force women on social assistance to join a dating agency in the hope that they would catch a man with money of his own? These examples refer to incidents which were intensively debated but never became reality. But one has to remain vigilant. Just Google the Dutch terms for “social assistance” (bijstand) “forced labour” (dwangarbeid) and one is bombarded with hits which tell stories of claimants of social assistance who feel degraded, bullied or exposed by the workfare practices. However subjective these stories may be, they do testify that the balance between rights and duties has shifted.

Exclusionary effects

The second danger presents itself on the level of the society as a whole. To what extent do workfare policies really contribute to the emancipation of the poor? This question has been emphatically raised by the French born sociologist *Loïc Wacquant* in a book called *Punishing the poor, from welfare state to penal state*.¹⁴ In this book the author gives a disturbing insight into some developments in the US

The American system of social assistance has been reformed in 1996 by an act with the ominous title *Personal responsibility and work opportunity reconciliation act*. The initiative for the reform came from the conservative politician Clay Shaw but the act was signed by Bill Clinton. The reform created a synthesis between the Democratic belief in activating policies and the Republican dogma of personal responsibility. The changes in the American system are similar to those that were introduced in the Netherlands, but they were earlier, more radical and on a grander scale. The system operates on the basis of block grants paid out by the central government to the various states. The grants are only payable when the states satisfy certain conditions: benefit dependency may not last longer than five years, a certain percentage of the beneficiaries must have found paid employment, and lack of co-operation on the part of the claimants must be punished with benefit cuts.

Wacquant is outspokenly negative about the new American social assistance system. According to the author one half of the claimants finds employment in temporary low paid jobs which condemn the persons involved to a permanent state of poverty. The other half simply disappears out of the system and will be adopted in the anonymity of the urban slums. According to Wacquant, this is symptomatic of the changes which are occurring in the US. Problems are no longer solved on the basis of a social agenda. Instead the citizen is made fully responsible for his own life and the degree in which he

¹⁴ The book as advertised under this title by the author but –to the best of my knowledge– a version in the English language has not yet appeared. There is French version and a translation into Dutch under the title *Straf de Armen, het nieuwe beleid van de social onzekerheid*, Berchem, 2006

or she can participate in the society. Where these policies fail the state reacts with sanctions and criminal measures. Since 1970, the number of prisoners has more than quadrupled (442%). This rise mostly involves small-scale offenders, drug addicts and the homeless. The majority originates from the poorer segments of the society. Most of them are black. One out of three black males would be subject to some form of criminal surveillance. It is as if Dickensian times are reviving again: the prison house as an alternative for social security. In the meanwhile maintaining the repressive system requires a huge public investment. Thus, according to the author, the 'light' American liberal state has developed a 'heavy' substructure to suppress the poor.

In the Netherlands, evaluations of the new social assistance legislation that came into force in 2003 show the same sort of ambivalence as in the US. On the one hand they are positive because more people who have found paid employment. On the other hand there are concerns about the quality of the jobs involved and there is a similar problem concerning the beneficiaries that simply no longer appear on the records; what happened to them?¹⁵ Another parallel relates to the repressive nature of the workfare policies. The public tolerance for those who do not adhere strictly to the rules and regulations has plummeted and the intensity of the sanctions (in number and severity) has increased. The dark side of the policies are mostly ignored. For example, hardly any attention is paid to research outcomes which point out that most of the fraud is committed unwillingly, due to a lack of understanding of the exact nature of the rules and bureaucratic obligations.¹⁶ In the meantime also in the Netherlands the number of prisoners has exploded; quadrupled since 1984. And again we are not dealing with heavy criminals but with representatives of the marginal groups in the society, such as the homeless, problematic youths and foreigners.¹⁷

In my view, these developments should be critically monitored, because, however biased Wacquant's analysis may be, it does contain a warning. The warning is that, if pursued too ruthlessly activation policies designed to be beneficial for the citizens may have the opposite effect, condemning 'those who stay behind' to a permanent underclass. Incidentally, this is also the conclusion of comparative study on workfare policies in the US and Europe by Joel F. Handler which repeatedly points at the risk that workfare policies have an exclusionary effect for those who are least employable.¹⁸

4. Workfare or forced labour?

Despite the dangers described above, it is important to bear in mind that the introduction of workfare policies does not necessarily imply a re-introduction of 19th century

¹⁵ Cf. Els Sol, Julie Castonguay, Hanneke van Lindert en Yvonne van Amstel, *Work first werkt. Op weg naar een evidence based-work first*, Utrecht, 2007.

¹⁶ Cf. Frank Miedema and Bob Post, *Fraude Onderzocht. Oorzaken en achtergronden van fraude met AOW, Anw en AKW*, ITS, Nijmegen, 2001.

¹⁷ M. Boone and M. Moerings, 'De Cellenexplosie, Voorlopig gehechten, veroordeelden, vreemdelingen, jeugdigen en tbs', *Justitiële verkenningen*, 2007, 9-30.

¹⁸ A similar point of view is expressed in cf. Joel F. Handler, *Social Citizenship and Workfare in the United States and Western Europe, The Paradox of Inclusion*, Cambridge studies in law and society, Cambridge, 2004, 245.

repressive practices. In the first place according to the general workfare philosophy forced public employment is not a goal in itself, but a first step on the ladder towards participation in the normal labour market. One could argue that the more successful workfare programmes are in realising an effective flow to regular employment, the more justified it is to make claimants perform tasks as a first step towards activity. In the second place, workfare practices do not operate in a void, but within the context of the law. This infers that claimants have a legal remedy when they feel that their rights are being infringed. It is then up to the courts to restore the balance between the rights and obligations. As long as the rule of law is upheld the dangers of the workfare approach described in the previous paragraph can be kept at bay. This presupposes an active attitude of the courts and a strict focus upon the protection of human rights. After all, it is the judge who must eventually test the legality of benefit cuts and sanctions and it is case law that must provide a framework of criteria for judging the validity of obligations imposed on the beneficiaries.

In order for the courts to exercise their corrective powers workfare practices should come within the realm of the law in the first place. That they do, seems perfectly obvious, but in reality this is not always recognized. Thus, for example, I came across an article in the *New York Times*, dealing with a decision of the U.S. Equal Employment Opportunity Commission of 30th September 1999 in which it was ruled that the New York administration had violated federal law when it turned away women who said they were being sexually harassed while working for their public assistance benefits.¹⁹ The allegations were very serious but the city had maintained that the women were not employees and had no legal right to protection from sex discrimination in the workplace, so it refused to co-operate with the proceedings. The case perfectly illustrates the harshness of the new policies and the responsibility of the courts (or as the case may be: independent tribunals) to restore the balance between rights and obligations.

The right to work (in particular the freedom of occupation) and the prohibition of slavery and forced labour as contained in several international human rights instruments may play an important role in providing a framework for testing the legality of workfare practices. But curiously there are hardly any national or international cases in which concrete decisions of social security administrations to withhold benefit rights were considered to be in violation of any of these rights, at least not that I am aware of. The general understanding seems to be that work duties may be imposed as a benefit condition and that withholding benefit rights does not impede someone's freedom of occupation, let alone constitute forced labour. Thus, in the case of *Johan Henk Talmus v. the Netherlands* the (then) European Commission on Human rights ruled that benefit cuts that were imposed because the applicant had refused to look for suitable employment, did not infringe art. 4 ECHR. (prohibition of slavery and forced labour) "In order to qualify for unemployment benefits (...) the applicant was required to look for and accept employment which was deemed suitable for him. Since he refused to comply with this condition, his benefits were temporarily reduced. It does not appear, however, that the applicant was in any way forced to perform any kind of labour or that his refusal to look for employment other than that of independent scientist and social critic made him liable

¹⁹ *New York Times*, front page, Nina Bernstein, 1 October 1999.

to any measures other than the reduction of his unemployment benefit. In these circumstances, the Commission cannot find that the present complaint raises any issues under Articles 4 para. 2, 9 and 1 of the Convention”²⁰

Similarly, in 2002 a Danish court did not accept that a suspension of benefit upon a refusal to accept an activation offer, was contrary to art. 4 ECHR. The Danish welfare-to-work option (activation offer) that the person had received was considered to be fair, in the sense that he was able to carry out the work, and that the objective of the requirement for participation in the welfare-to-work programme as a condition for receiving cash benefits was to become self-supporting. The only consequence of the plaintiff’s refusal to participate in the welfare-to-work programme was that he, while the job offer was open, lost his entitlement to cash benefits. According to the court there was neither evidence in the wording of the ECHR, nor in the case law of the European Court of Human Rights to assume that the connection between participation in a welfare-to-work programme and the reception of cash benefits could imply a threat of “punishment” within the meaning of art. 4 of the Convention.²¹

Likewise in a recent judgement the local Amsterdam court ruled that the duty of a social assistance claimant to work in a sweet factory did not constitute forced labour, because the applicant was not coerced into anything, also not when his benefit would be suspended. Moreover the work duty had to be considered as a “normal civic obligation” as being one of the exceptions referred to in art. 4.²²

I have great trouble in accepting the way courts tend to reject outright the relevance of the prohibition to forced labour in social security cases. Firstly, by doing so courts fail to appreciate the great responsibility which rests upon them to protect the proper balance between rights and obligations in times of the introduction of workfare policies. Secondly, the case law does not recognize that withholding benefits rights may constitute a serious form of pressure and coercion upon the person involved. According to the European Court of human rights forced labour is labour exacted under menace of any penalty and performed against the will of the person involved, that is work for which he has not offered himself voluntarily”²³ I fail to see why under some circumstances, particularly long term benefit dependency, sanctions would not amount to such penalty. And finally, the case law still seems to be based on the underlying assumption that nobody is forced to apply for social security benefits. But in my view the point of reference for judging the question of whether freedom rights are violated should not be the freedom to apply for a benefit, but rather the right to social security as a fundamental right for all.

²⁰ ECHR no. 30300/96, decisions of 26 February 1997, J.H. Talmon v. Netherlands, EHRLR 1997, 448-449.

²¹ High Court of Eastern Denmark, B-1420, 19 December 2002 discussed in Danny Pieters and Bernhard Zaglmayer, *Social security cases in Europe: national courts*, Antwerp, 2006, 45-46.

²² Rechtbank Amsterdam 8 June 2008, LJN: BD7415, Rechtbank Amsterdam, AWB 07/3717 WWB, AWB 07/4337 WWB, AWB 07/4609 WWB.

²³ EcrHR judgement of 23 November 1983, Van der Mussele v. Belgium, para 34.

5. A fresh approach: the district court of Arnhem, 8 October 2008

I would welcome a more critical approach to be adopted in case law. Referring to the general criteria which have been developed by the European Court of Human Rights in respect of the probation of forced labour and compulsory employment contained in art. 4 ECHR, in particular in the cases of *Van der Mussele* and *Siliadin*²⁴ it should be possible to extract a number of minimum standards for testing the legality of workfare practices. There are three elements which in my view should be tested critically, i.e.

- the nature of the employment
- the duration of the employment
- severity of the sanction

With regard to the *nature of the employment* a distinction must be made between labour which is carried out under a regular contract of service and labour in public employment in consideration for the payment of benefits. When dealing with the second type of labour, special attention should be paid to the question of whether the labour suits a person's physical and mental capacities and is in line with the official policy objective of workfare, i.e. it should be conducive to one's personal development and the improvement of one's chances on the regular labour market. Degrading or useless activities shall not be allowed.

With regard to the second element of the *duration*, I am of the opinion that it is not allowed to require a person to carry out public duties on a more or less permanent basis. When, after a couple of years person in question still has not found a regular job, the civic work duties should be ended to allow a person to choose voluntary activities or sheltered employment.

Finally, with regard to *sanctions*, it may be argued that a refusal to accept work duties may only be penalized by temporary or partial benefit cuts. Full and permanent benefit cuts shall not be permitted.

Just before submitting this article a local court in Arnhem passed a judgement which must be considered a major break through in this matter.²⁵ The case dealt with a social assistance beneficiary with an academic background who had been told to accept certain activities, offered to him by 'training centre', a facility set up under the work first programme of the town of Arnhem.. The beneficiary was told to sign a 'job experience agreement' under which he was given the choice either to work as a public gardener (weeding, hoeing), or to pack boxes of super glue. The beneficiary had signed the agreement but subsequently refused to co-operate in the activities imposed on him by his 'case manager'. This resulted in a penalty of a 40% benefit cut, during the period of one month. The beneficiary appealed against this penalty in an attempt to force the court to take a principle stance about the work first duties in relation to the prohibition of forced labour. In its judgement the court came to the conclusion that the practices of the local

²⁴ EcrHR judgement of 26 July 2005, *Siliadin v. France*

²⁵ Rechtbank Arnhem, 8 October 2008, LJN BF 7284

council of Arnhem were not contrary to the prohibition of slavery and forced labour contained in art. 4 ECHR. The fact that the workfare activities were not voluntary because imposed under the threat of a penalty, did not alter this conclusion because, according to the court, social assistance merely is a safety net which presupposes a person to return to paid employment as soon as possible. But while on the one hand the court ruled that in this case the activities offered should not be considered as disproportionate and excessive, it did on the other hand envisage that work first practices may run contrary to art. 4 ECHR, i.e. in the case of a beneficiary who is forced to carry out activities under threat of a penalty for a longer time when it is clear that such activities are in no way conducive to the re-integration in the regular labour market. Eventually the court ruled that the penalty imposed by the Arnhem council was unlawful, because the council had failed to make clear that the activities in question could have a positive impact upon the job opportunities of the person involved, leaving aside whether there was a breach of art. 4 ECHR or not.

As said, for our subject this judgment of the Arnhem court constitutes a major breakthrough. Not only is it novelty that a court admits that forcing beneficiaries into activities in return to benefit payments may constitute forced labour or compulsory employment, but also we begin to see the first contours of the criteria which benefit agencies engaged in work first practices must adhere to.

6. Résumé

In this article I have described how the harsh work test applied in the 19th century has gradually softened. As a consequence of the right to work and the right to social security the harsh work test has been replaced by a more moderate system which tries to strike a balance between the right to benefit and the obligation to work. This balance is, however, shifting is a result of the workfare approach. This approach, generally advocated to activate social security claimants, is not devoid of dangers. Social security administrations may exercise indiscriminate powers over individuals. And, if pursued too ruthlessly, activation policies which are designed to be beneficial for the citizens may have the opposite effect, condemning 'those who stay behind' to a permanent underclass. It is up to the courts to restore the balance between the rights and obligations. As long as the rule of law is upheld the dangers of the workfare approach can be kept at bay. This requires an active attitude of the courts and a strict focus upon the protection of human rights. When dealing with the prohibition of forced labour both the European Court of Human Rights and some national courts tend to apply these rights too restrictively. I have argued that it is no longer acceptable to reject outright the relevance of the prohibition of forced labour in social security cases. Instead, minimum standards for testing the legality of workfare practices should be developed. These should refer to the nature and duration of public employment duties, as well as to the severity of the sanctions. The recent decision of the Dutch district court of Arnhem of 8 October 2008 constitutes a perfect illustration of such an alternative approach.